that she has been referred to the Board of Registration in Medicine, and the conclusions and findings of an internal peer review committee known as the "Sallan Committee."

The latter included two documents, "Synopsis of the Conclusions and Recommendations of the Internal Peer Review Committee of the Board of Trustees of the Dana-Farber Cancer Institute" ("Synopsis") and the "Institute Actions in Response to Synopsis of the Conclusions and Recommendations of the Internal Peer Review Committee of the Board of Trustees of the Dana-Farber Cancer Institute" ("Response"). Both documents were provided to the Petitioners by a confidential source whom they refused to identify and whose identity was otherwise undiscoverable. Likewise, Petitioners refused to identify their "confidential" sources for the protected Corrective Action information or for the statutorily-protected information concerning the investigation by the Board of Registration in Medicine. The identities of those sources were also otherwise undiscoverable. Petitioners also refused to produce relevant information about *non-confidential* sources.

Before the March 23, 1995 article, Dr. Ayash had never been in the public eye and "was in no sense a public figure." Resp. App. 10a. However, as a result of the Petitioners' relentless coverage designed, in part, to attempt to make true that which was false (*i.e.*, that she was the "leader of the team" or otherwise centrally involved), she was involuntarily thrust into public view. Petitioners' coverage caused Dr. Ayash to be scapegoated by the DFCI, exposed her to unwarranted investigation and censure, led to tremendous emotional distress and reputational harm, and ultimately contributed to her dismissal from the DFCI, her inability to find work within the reach of Petitioners' circulation, and her forced relocation to another part of the country into a different type of position.

C. Statement of Proceedings in State Court

Dr. Ayash brought suit against Petitioners Globe Newspaper Company, Inc. ("The Boston Globe") and Richard A. Knox, alleging defamation/libel (against The Boston

Globe and Knox), violation of privacy rights under Massachusetts General Laws chapter 111, sections 203 and 53B (against The Boston Globe and Knox),[2] Intentional/Negligent Infliction of Emotional Distress (against Knox), and Intentional Interference with Advantageous Business Relationships (against Knox). In addition, Dr. Ayash asserted claims against the DFCI and its former Physician-in-Chief, David M. Livingston, M.D. "At the heart of [Dr. Ayash's] case were her intertwined assertions that officials at Dana-Farber were intentionally 'scapegoating' [her], at the same time that the Globe and Knox were intentionally 'spotlightling' her for public censure." Pet. App. 49a. Given the interconnection between the activities of Petitioners and their co-defendants, Dr. Ayash pursued, among other theories, a claim of joint and several liability.

Throughout lengthy discovery, Petitioners' refused to provide any information concerning their so-called "confidential" sources, including their identities. They refused to provide such information in response to numerous document requests, multiple sets of interrogatories, and at depositions. Although Dr. Ayash sought the information from all reasonable possible alternate sources by way of document requests, interrogatories, and subpoenas, she could not obtain the information.

In light of Petitioners' refusal to produce the discovery sought, Dr. Ayash moved for an order compelling disclosure of the identity of the source(s). The Superior Court granted that motion on February 23, 1998, employing the balancing test urged by the Petitioners. Resp. App. 17a ("defendants urge the court to prevent discovery based upon a 'balancing between the public interest in every person's evidence and the public interest in protecting the free flow of informa-

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[2] The Superior Court granted Petitioners' motion for summary judgment on the privacy claim, holding that although "Ayash, at least prior to the disclosures about her, was in no sense a public figure, . . . having been 'drawn into a particularly public controversy,' she arguably became a public figure for a limited range of issues." Resp. App. 10a.

tion"). Finding that "the information was given to Knox over two and a half years ago with respect to an isolated incident" and that "the information sought [was] not cumulative or otherwise available," the court held that the Petitioners had failed to meet their threshold burden under the balancing test urged. It nonetheless continued to consider the remaining factors of the balancing test and found that "Ayash's need for this information is tangible and substantial," that she had "exhausted all reasonable alternative sources for the information," and that the "information which the Globe defendants seek to keep confidential 'relates to the fact issue which is central to the plaintiff's case.'" Resp. App. 18a.

Petitioners sought and obtained an immediate interlocutory appeal. On appeal, the Massachusetts Court of Appeals affirmed the order compelling discovery, finding that Petitioners' "showing fails to establish that the claimed damage to the free flow of information is anything more than speculative and theoretical." Resp. App. 22a. The Appeals Court invited Petitioners on remand to seek a "protective order reasonably limiting, on specified terms and conditions, the use, disclosure, and dissemination of any privileged or confidential information." *Id.*

After the Appeals Court's ruling, Petitioners continued to refuse to produce the requested discovery. Accordingly, Dr. Ayash moved, pursuant to Mass. R. Civ. P. 37, for a finding of civil contempt.[1] On August 13, 1998, the Superior Court granted the motion. Resp. App. 23a-25a. In support of its decision, the Superior Court noted that "although Ayash has agreed to accept a limited protective order and this Court has indicated its willingness to grant such an order, the *Globe* defendants have refused to consider this proposal." Resp. App. 24a. The court further found that Petitioners "have steadfastly refused to provide any discovery

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[1] The contempt order is *not* the order that is the subject of this Petition.

regarding the purported 'confidential sources' under any circumstances." *Id.* The Superior Court accordingly held Petitioners in civil contempt and imposed a daily escalating fine until such time as Petitioners complied with the order compelling discovery. Resp. App. 25a.

Petitioners sought and obtained interlocutory review of the Superior Court's order holding them in civil contempt. While that appeal was pending, the confidential source who had told Mr. Knox that his statement that Dr. Ayash had countersigned the overdose order was incorrect released him from his pledge of confidentiality.[4] Knox, accordingly, no longer sought to maintain confidentiality with respect to that source. However, Dr. Ayash continued to seek—and Petitioners continued to refuse to produce—the "confidential" source information pertaining to "(1) the information that Ayash was the subject of a Dana-Farber internal "corrective action" investigation; (2) the information that Ayash was the subject of an investigation by the board of registration; and (3) documents provided to Knox concerning recommendations made by Dana-Farber's internal peer review committee and Dana-Farber's responses." Pet. App. 87a.

The Appeals Court held that, although there was no absolute privilege grounded in the Constitution, Petitioners were entitled to the benefit of a balancing test not used for non-media litigants. Specifically, the Appeals Court held that "a party seeking to avoid disclosure must first 'make some showing that the asserted damage to the free flow of information is more than speculative or theoretical." Pet. App. 90a. If such a showing is made, then the court will "balance 'the public interest in every person's evidence and the public interest in protecting the free flow of information,' in order to determine whether disclosure should be prevented." *Id.* Finding that Petitioners had made "some showing" of non-theoretical danger to the free flow of infor-

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[4] Petitioners' suggestion that Dr. Ayash knew the identity of this source beforehand is incorrect.

mation and that the confidential source information pertaining to the libel claim had now been disclosed, the Appeals Court remanded the issue to the Superior Court for application of the balancing test with respect to Dr. Ayash's remaining claims.[5]

On remand, the Superior Court applied the balancing test required by the Appeals Court. In doing so, it found that the identity of the source who provided Knox with the *Synopsis* and the *Response*

> bears directly on Ayash's claims against Knox for intentional and negligent infliction of emotional distress. . . . Whether Knox engaged in actionable "extreme and outrageous behavior" depends on the methods and circumstances by which he obtained and revealed these documents. The Boston Globe and Knox's refusal to provide any identifying information about the source(s) who provided the Synopsis and the Institute Response severely undermines Ayash's ability to establish the elements necessary to prove her intentional and negligent infliction of emotional distress claims.

Pet. App. 80a.[6] The Superior Court also found that the discovery "b[ore] directly on Ayash's claims against the DFCI defendants":

> Whether the DFCI breached the requirements of its own by-laws regarding confidentiality, whether the DFCI breached the implied covenant of good faith and fair dealing by turning over highly confidential material, and whether the DFCI invaded Ayash's privacy by releasing to the press a docu-

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[5] Petitioners incorrectly claim that Dr. Ayash had not previously argued that the information was necessary to her non-libel claims. The Appeals Court's decision makes clear that she had indeed done so. *See* Pet. App. 97a.

[6] Petitioners' claim that the "confidential" source information bore only on claims against the DFCI and Dr. Livingston is flatly belied by the record.

> ment which, until that point, was medical peer review material, all depend on whether the source(s) was a DFCI agent or employee.
>
> ... If the DFCI was not the direct or indirect source of the materials which ended up in the possession of Knox, Ayash's claims, to the extent they are dependent on the disclosure of the Synopsis and the Institute Response, will fail. Thus, identification of the source is critical.
>
> The same reasoning holds true with regard to the information concerning the Corrective Action proceedings which were contractually mandated to be maintained in confidence; and, further, to the information regarding the Board of Registration of Medicine, which is required to remain confidential until an advanced phase in the proceedings which has never been reached in the present case. See 243 C.M.R. §1.02(8)(b).

Pet. App. 80a-81a.

While continuing to refuse to comply with the Superior Court's discovery order, Petitioners filed three separate motions for summary judgment. First, Petitioners filed a motion for partial summary judgment seeking a determination that Dr. Ayash was a public figure. Petitioners' repeated claim now that Dr. Ayash was adjudged to be a public figure in the state court proceedings is incorrect and belied by the fact that they filed a motion seeking such a determination. Second, Petitioners filed a motion for summary judgment on the libel claim, arguing that Dr. Ayash would not be able to prove "actual malice" as required of public figure plaintiffs under *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Third, Knox filed a summary judgment motion on the emotional distress claim against him, arguing that Dr. Ayash

would not be able to prove that his actions had been "extreme" or "outrageous."[7]

In the meantime, in his resumed deposition Knox volunteered that one of his confidential sources had been a *non-confidential* source on other occasions. Accordingly, Dr. Ayash propounded the following interrogatory:

> Identify each and every source who provided you information between January 1, 1996 and December 31, 1998 without requesting confidentiality or anonymity and who was at the time or in 1995 either an employee or a trustee of the Dana-Farber Cancer Institute.

Knox refused to provide any answer to this interrogatory.

On June 13, 2000, the Superior Court granted Dr. Ayash's motion to compel Knox to answer the interrogatory seeking the identities of non-confidential sources. In ruling on this motion, the Superior Court clearly put Petitioners on notice that, by continuing to defy the court's discovery orders, they were running the risk of entry of a default judgment pursuant to Mass. R. Civ. P. 37(b)(2)(C):

> Knox's failure to reveal his non-confidential sources after being ordered by this Court to do so would permit the plaintiff to request entry of a default judgment against him pursuant to Mass. R. Civ. P. 37(b)(2)(C). . . . Rather than face the prospect of incarceration or a substantial fine, Knox would have to balance his desire to protect the identity of those individuals who have given him non-confidential information against the probability of a default judgment as to liability and a hearing before the court to assess the damages his conduct has caused the plaintiff in this case.

Pet. App. 75a-76a.

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[7] Because of the subsequent proceedings in the case, the three summary judgment motions were never decided.

Notwithstanding this clear warning of the risks involved, Petitioners chose to continue to refuse to comply with either of the then-governing orders requiring discovery, refusing to produce both the non-confidential and the confidential source information.

On April 2, 2001, the Superior Court ruled on Dr. Ayash's motion for sanctions pursuant to Mass. R. Civ. P. 37 for Petitioners' failure to comply with the court's discovery orders of October 21, 1999 and June 13, 2000. Finding that (a) Petitioners continued to "steadfastly" refuse to produce the required discovery "under any circumstances;" (b) Petitioners refused Dr. Ayash's and the court's willingness to receive the information under the terms of a restrictive protective order; (c) the previously-imposed fines had not been effective at inducing Petitioners' compliance; and (d) Petitioners' refusal to produce the ordered discovery "may also effectively protect the Dana Farber Cancer Institute and David M. Livingston from liability," the court entered a default judgment of liability against the Petitioners as a sanction specifically permitted under Mass. R. Civ. P. 37(b)(2)(C). Pet. App. 71a-73a.

At the same time, the court allowed Petitioners to avoid the sanction at any time:

> The interests of justice will not be adequately served by the mere imposition of a default judgment against the *Globe* defendants, but the court, perhaps naively, clings to the hope that the *Globe* defendants will eventually recognize their continuing legal obligation to permit discovery in this matter and will ultimately comply with Ayash's narrow discovery requests.

Pet. App. 72a. The court's hope proved to be misplaced; Petitioners chose to incur the sanction rather than to comply with the discovery orders. As a result, the issue of damages was tried to a jury for approximately five weeks.

On appeal, and after extensive briefing and argument, the Supreme Judicial Court of Massachusetts affirmed both the discovery orders and the discovery sanction. *See* Pet.

App. 44a-51a. The Supreme Judicial Court determined that the Superior Court had not abused its discretion in ordering the limited discovery sought and had employed the correct balancing test. That test, contrary to Petitioners' assertion, incorporated considerations rooted in the First Amendment and Article 16 of the Massachusetts Constitution:

> We have recognized that values underlying the First Amendment to the United States Constitution and art. 16 of the Amendments to the Massachusetts Constitution may give rise to a common-law privilege that would allow a news reporter to refuse to reveal his sources. In deference to the effect that compelled disclosure has on free speech, and to avoid the "needless disclosure of confidential relationships," our cases require a judge ruling on discovery requests, on a showing that "the asserted damage to the free flow of information is more than speculative or theoretical," to conduct a balancing test between "the public interest in every person's evidence and the public interest in protecting the free flow of information." As has been stated above, the judge carefully performed the balancing test and properly concluded that, in this case, the plaintiff's need for the requested information outweighed the public interest in the protection of the free flow of information to the press.

Pet. App. 50a n.33 (citations omitted).

Among the factors that the Supreme Judicial Court found supported the discovery orders was the fact that "the overdose incidents had occurred over six years previously" and "[t]here [wa]s nothing in the record to suggest that Knox continued to receive or collect information pertaining to the overdoses from these sources that would justify the continued concealment of their identities." Pet. App. 48a. Further, the information withheld "bore directly on the

plaintiff's claims against Knox and Dana-Farber."[8] *Id.* Perhaps most importantly, the Supreme Judicial Court noted the severe prejudice to Dr. Ayash from the Petitioners' refusal to produce the required information:

> As a result of the Globe defendants' refusals to comply with the discovery orders, the plaintiff lost her opportunity to proceed against the defendants on a theory of joint and several liability. Knowledge of who (if anyone) at Dana-Farber had spoken to Knox, and exactly what had been said, could have allowed the plaintiff to bolster her asserted claims or to add new ones.[9]

Pet. App. 49a.

The Supreme Judicial Court also dismissed the case against Dr. Livingston, as to whom the jury had rendered a verdict of $840,000, because of Dr. Ayash's inability to prove that he was a direct or indirect "confidential source."[10] Because the case against Dr. Livingston was dismissed, not remanded, this harm to Dr. Ayash is permanent.

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[8] In light of this, Petitioners' contention that "the sources' identities were, in the Supreme Judicial Court's words 'peripheral at best' to the legally-deficient non-libel claims for which their disclosure was ordered'" (Pet. 3) is disingenuous at best. The court's view as to the importance of this information explains why the court did not accept Petitioners' assertion that their refusal to comply with the discovery orders was of no legal consequence.

[9] The jury found against Dr. Ayash with regard to joint and several liability, thereby indicating that the Petitioners' non-compliance with the discovery orders was far more than academic.

[10] "The plaintiff alleges that Livingston may have been Knox's 'confidential source' at Dana-Farber who had supplied her name in connection with the announced corrective action proceedings, or who had passed Knox a copy of the hospital's highly confidential Sallan committee synopsis. The plaintiff also suggests that Livingston may have secretly provided to the board of registration a copy of his July 12 letter responding to the committee's corrective action recommendations. These allegations are without support in the record and are far too speculative to form a basis for a finding of improper motive." Pet. App. 43a-44a n.29.

ARGUMENT

I. THE PETITION FOR CERTIORARI RAISES NO IMPORTANT FEDERAL QUESTION

A. Discovery Rulings, Including Those Imposing Default Or Involving Assertions Of A Reporter's Privilege, Do Not Merit Review By This Court

Supreme Court Rule 10 provides that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." There is no question that the Massachusetts courts applied the correct rule of law in this case. Petitioners do not challenge that Massachusetts Rule of Civil Procedure 37 sets out the remedies available to the Massachusetts courts for discovery violations. Nor do Petitioners challenge that Massachusetts Rule of Civil Proceduure 37(b)(2)(C) specifically allows the court to impose as a sanction:

> An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Mass. R. Civ. P. 37(b)(2)(C). There is no exemption, stated or implied, in Rule 37 for parties who happen to be engaged in newspaper work.

The decision as to whether to impose a sanction of default is a fact-based one. As a result, it is reviewed only for abuse of discretion. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (reversing and reinstating order of dismissal under Fed. R. Civ. P. 37), *reh'g denied*, 429 U.S. 874 (1976). The sanctions of dismissal and default, although harsh, "must be available to the district court in appropriate cases, not only to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League*, 427 U.S. at 643;

Roadway Express, Inc. v. *Piper*, 447 U.S. 752, 763-764 (1980).

Because the imposition of a discovery sanction and the ordering of discovery are both fact-based inquiries, this Court has been loathe to grant review—even where the sanction was default or the discovery ordered involved materials for which a claim of reporter's privilege was made. *See, e.g.*, *Miller* v. *United States*, __S. Ct.__, 2005 WL 1121635, 73 U.S.L.W. 3686, 73 U.S.L.W. 3702 (June 27, 2005) (No. 04-1507); *Cooper* v. *United States*, __S. Ct.__, 2005 WL 1121635, 73 U.S.L.W. 3686, 73 U.S.L.W. 3702 (June 27, 2005) (No. 04-1508); *United States* v. *Burke*, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Carey* v. *Hume*, 492 F.2d 631 (D.D.C.), *cert. dismissed*, 417 U.S. 938 (1974); *Henry* v. *Sneiders*, 490 F.2d 315 (9th Cir.), *cert. denied*, 419 U.S. 832 (1974).

The same reluctance should hold here because no review is possible without drawing this Court into disfavored review of factual determinations, including those that were the factual predicates underlying the discovery rulings and sanction in this case, such as:

- Petitioners' refusal to produce relevant non-confidential information (which is subject to no legal protection) in addition to relevant information they claimed came from "confidential" sources;
- Petitioners' repeated suggestions to the court that they would not comply with any order compelling disclosure and that no sanction of any sort would cause them to change their position;
- Petitioners' refusal to entertain the option of producing the information under a protective order that would restrict the parties' use of the information and prevent its disclosure outside the litigation;
- Dr. Ayash's need for the information for her claim against Knox who, at the same time that he was refusing to produce the information, was asserting that Dr.

Ayash was required to prove "extreme" and "outrageous" conduct on his part—showings that were extremely difficult without the discovery;

- Dr. Ayash's heightened need for the information in light of Knox's argument that, as a public figure, she was required to meet the heightened proof of "actual malice;"
- Dr. Ayash's need for the information to establish joint and several liability against all defendants, as well as her claims against the DFCI and Dr. Livingston;
- The undisputed unavailability of the information from other sources;
- Dr. Ayash's exhaustion of all reasonable avenues of discovery available to her;
- Petitioners' failure to establish any meaningful threat to the free flow of information were the sources to be disclosed, the overdoses being of purely historical interest at that point and Knox no longer using the sources; and
- The ineffectiveness of lesser sanctions, as demonstrated by the Petitioners' refusal to comply with the sanction imposing a daily escalating fine.

Because granting certiorari would necessarily draw this Court into undesirable review of factual determinations, and those determinations should in any event be left undisturbed in that there is no reason to think that the Massachusetts courts abused their discretion under the rule governing their decisions (*i.e.*, Mass. R. Civ. P. 37), the petition should be denied.

B. The Discovery Rulings Raise No Important Federal Question Concerning The First Amendment

In both the criminal and civil contexts, this Court has held that there is no absolute privilege regarding reporters' sources of information. *Herbert* v. *Lando*, 441 U.S. 153, 160 (1979) (no absolute privilege in civil libel case); *Branzburg* v. *Hayes*, 408 U.S. 665 (1972) (no absolute privilege in case in-

volving grand jury). Neither *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), nor its progeny, including *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), "suggest any First Amendment restriction on the sources from which [a] plaintiff c[an] obtain the necessary evidence to prove the critical elements of his cause of action." *Herbert*, 441 U.S. at 160. Although *Herbert* did not involve confidential sources, the principles underlying its decision and those of *Branzburg* (which did involve confidential sources) are equally applicable here. Namely, both cases stand for the proposition that the First Amendment does not afford reporters an absolute privilege or protection from discovery obligations. Both also expressed a strong disfavor for the creation of new evidentiary privileges: "We are asked to create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do." *Branzburg*, 408 U.S. at 690; *see also Herbert*, 441 U.S. at 175 ("Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances.... [E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

Petitioners apparently do not seek certiorari in order to establish the existence of an absolute privilege. At least they do not state as much. If they in fact do so, that question has already been decided in *Branzburg* and *Herbert* and need not be revisited.

To the extent Petitioners argue that this Court should grant review in order to address the question of whether a "qualified privilege" shields the discovery of non-confidential and confidential source information, that issue is not presented in this case. Assuming *arguendo* that a qualified privilege were to exist, the Massachusetts courts engaged in the balancing test that such a qualified privilege might require. At both the trial and appellate levels, the Massachusetts courts acknowledged that a "common law privilege"

may apply, and imposed a balancing test between "the public interest in every person's evidence and the public interest in protecting the free flow of information." Pet. App. 50a n.33 (citing *Petition for the Promulgation of Rules Regarding the Protection of Confidential News Sources & Other Unpublished Information*, 395 Mass. 164, 172 (1985)). Thus, as a practical matter, a qualified privileged was in fact applied in this case, raising no important federal question for this Court. In addition, the application of that balancing test was necessarily dependent on factual findings that this Court should and need not review and that do not present or constitute "important federal questions" within the scope of Supreme Court Rules 10(b) & (c).

C. The Discovery Sanction Raises No Important Federal Question Of Due Process Under The Fourteenth Amendment

It has long been established that the imposition of a default judgment with regard to liability does not, as a matter of law, violate due process under the Fourteenth Amendment. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909). Instead, dismissal or default as a sanction for discovery violations is consistent with due process unless "failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958); *National Hockey League*, 427 U.S. at 640 (citing *id.*) (reversing and reinstating Rule 37 discovery sanction of dismissal).

Without explanation, Petitioners ignore *Hammond Packing* and instead choose to reach back to a late nineteenth-century decision, *Hovey v. Elliott*, 167 U.S. 409 (1897). However, the "holding [of *Hovey*] was substantially modified by *Hammond Packing Co. v. Arkansas*, where the Court ruled that a state court, consistent with the Due Process Clause of the Fourteenth Amendment, could strike the answer of and render a default judgment against a defendant who refused to produce documents in accordance with a pretrial order." *Societe Internationale*, 357 U.S. at 209-210.

Although Mass. R. Civ. P. 37(b) is not identical to its federal counterpart, the Supreme Judicial Court has turned to this Court's decision in *Societe Internationale*, 357 U.S. 197 (1958), in guiding the interpretation of the state rule and in holding that—unless the discovery failure is caused by a party's inability to comply—constitutional due process has been satisfied. *Roxse Homes Ltd. P'ship* v. *Roxse Homes, Inc.*, 399 Mass. 401, 405 n.5 (1987). In this case, there is no question that Petitioners' refusal to comply with the discovery orders was willful and not caused in any way by inability to comply.

The fact that Petitioners refused to produce discovery based "upon what [they] deemed to be [their] lawful rights and privileges, even if that course of conduct was taken because of a contrary conception as to the meaning of the [law]" does not create a due process issue. *Hammond Packing*, 212 U.S. at 347. This principle is even more apt where, as here, Petitioners refused to produce *non-confidential* source information to which no privilege could or did apply. At bottom, faced with a sanction that at all times lay in their hands to avoid, Petitioners chose instead to incur a default judgment on the issue of liability. That choice does not create a violation of Fourteenth Amendment due process. *See Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) (as long as a party is free to accept or reject a choice, there is no violation of due process). As the Supreme Judicial Court found, "[t]his is clearly not a case where the Globe defendants were unable to comply with the orders." Pet. App. 49a n.33.

II. THE SUPREME JUDICIAL COURT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT, THE FEDERAL COURTS OF APPEALS, OR THE DECISIONS OF THE HIGHEST COURT OF ANOTHER STATE

A. The Supreme Judicial Court's Decision Does Not Conflict With The Decisions Of This Court

Rather than addressing Massachusetts Rule 37 or its federal analog, both of which are conspicuously absent from the Petition, or even relying on this Court's decisions pertaining to reporters' obligations to produce evidence, Peti-

tioners turn instead to completely inapplicable cases that involve no discovery violations or assertions of a reporter's privilege. Petitioners do so in an attempt to transform this case into one raising constitutional issues that are not, in fact, at issue in this case.

In *Branzburg*, the Court clearly stated that cases involving assertions of a reporter's privilege do not implicate the press's First Amendment rights of publication. Unlike cases involving publication, a claim of reporter's privilege

> involve[s] no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue.

408 U.S. at 681.

Despite this clear legal distinction between reporters' obligations to produce evidence and the media's right of publication, Petitioners' arguments that a federal question exists and that it was decided in conflict with decisions of this Court, rely heavily and incorrectly on cases dealing solely with the press's rights of publication. Unlike the case at hand, each of the following cases relied on by Petitioners involves the right of publication or speech. *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001) (First Amendment question arising from publication of information was published); *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (ordinance restraining showing of movies based on their content), *reh'g denied*, 475 U.S. 1132 (1986); *Consolidated Edison Co. of New York, Inc.* v. *Public Serv. Comm'n of New York*, 447 U.S. 530 (1980) (order restricting political speech from utility bills); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978) (statute criminalizing publication of administrative hearings); *Freedman* v. *Maryland*, 380 U.S. 51 (1965) (prior restraint of speech in the form of a movie); *Speiser* v. *Randall*, 357 U.S. 513 (1958) (prior restraint on veterans' speech); *Craig* v. *Harney*, 331 U.S. 367 (1947) (criminal con-

tempt by publication); *Bridges* v. *California*, 314 U.S. 252 (1941) (same).

Petitioners cannot create a question of constitutional dimension by relying on inapplicable decisions: the issue of the right of publication has no place in this case. At all times, Petitioners were free to publish what they wanted, how they wanted, and where they wanted. As such, there is no conflict between the decisions of this Court concerning the content or manner of publication and the decision of the Massachusetts Supreme Judicial Court in this case.

Similarly, no conflict exists with the remaining decisions of this Court relied upon by Petitioners. Not one of those cases involves the assertion of a reporter's privilege, confidential sources, or the imposition of discovery sanctions of any sort. *See Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46 (1988) (no issue of reporter's privilege, confidential sources, or discovery sanctions); *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767 (1986) (did not reach question of permissible reach of Pennsylvania's shield law); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (no issue of reporter's privilege, confidential sources, or discovery sanctions); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967) (same); *DeGregory* v. *Attorney General of New Hampshire*, 383 U.S. 825 (1966) (same); *United States* v. *Bryan*, 339 U.S. 323 (same), *reh'g denied*, 339 U.S. 991 (1950).

Not only do the cases cited not involve the reporter's privilege or discovery rulings, they involve the question of the burden of proof for public figures, a question that was never finally adjudicated in the state court proceedings. Dr. Ayash was never adjudged an unlimited public figure, as demonstrated by the fact that Petitioners filed a summary judgment motion seeking such an adjudication. *See supra* pp. 9-10. No such motion would have been necessary had the issue been finally decided as petitioners now apparently contend. Moreover, the motion was never ruled on because of the subsequent proceedings in the case. *Id.* Petitioners cannot rely on cases discussing the burdens of proof in libel cases where they voluntarily and deliberately chose to forgo

those arguments by defying the trial court's discovery order. There can be and is no conflict where, as here, the legal issue argued by Petitioners was never reached below.

B. The Supreme Judicial Court's Decision Does Not Conflict With The Decisions Of The Federal Courts Of Appeals[11]

1. Assertion of reporter's privilege

Since *Branzburg*, 408 U.S. 665, in 1972, every federal court of appeals has employed, as here, a balancing test in determining whether a reporter's confidential sources must be disclosed in civil litigation. Whether a particular court has read *Branzburg* to create no privilege or to create a qualified privilege, that distinction is one of nomenclature, not substance. Whatever the theory is called, each court has employed a fact-intensive balancing test to determine whether confidential source information should be compelled in the particular circumstances. There is, thus, no conflict because the Supreme Judicial Court performed exactly the type of balancing test performed by the federal courts of appeals:

> In deference to the effect that compelled disclosure has on free speech, and to avoid the "needless disclosure of confidential relationships," our cases require a judge ruling on discovery requests, on a showing that "the asserted damage to the free flow of information is more than speculative or theoretical," to conduct a balancing test between "the public interest in every person's evidence and the public

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[11] Petitioners rely on several district court cases: *Lacalt* v. *C.K. McClatchy*, 116 F.R.D. 438 (D. Nev. 1987); *Sharon* v. *Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984); *Dowd* v. *Calabrese*, 577 F. Supp. 238 (D.D.C. 1983); *DeRobert* v. *Gannett Co.*, 507 F. Supp. 880 (D. Hawaii 1981); *Mazzella* v. *Philadelphia Newspapers, Inc.*, 479 F. Supp. 523 (E.D.N.Y. 1979). Even assuming that the decision of the Supreme Judicial Court is in conflict with any of these decisions (which it is not), a conflict between a state's highest court and the decision of a federal district court is not a basis for certiorari within the scope of Supreme Court Rule 10.

> interest in protecting the free flow of information." As has been stated above, the judge carefully performed the balancing test and properly concluded that, in this case, the plaintiff's need for the requested information outweighed the public interest in the protection of the free flow of information to the press.

Pet. App. 50a n.33 (citations omitted).

As the following brief survey demonstrates, the balancing test used by the Supreme Judicial Court is entirely consistent with the analyses of the various federal circuit courts:

First Circuit. The First Circuit has quite recently considered the issue of an assertion of reporter's privilege. In *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004),[12] the court reviewed the previous history of this issue within the circuit and held that "[t]he three leading cases in this circuit require 'heightened sensitivity' to First Amendment concerns and invite a 'balancing' of considerations.... In substance, these cases suggest that the disclosure of a reporter's confidential sources may not be compelled unless directly relevant to a nonfrivolous claim or inquiry undertaken in good faith; and disclosure may be denied where the same information is readily available from a less sensitive source." *Id.* at 45 (citations omitted). In the civil context, the First Circuit has also employed a balancing test: the "court must balance the potential harm to the free flow of information that might result against the asserted need for the requested information." *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980). In that the state trial and appellate courts used this same legal standard, no conflict exists with the decisions of the First Circuit. Moreover, on the facts, Dr. Ayash satisfied the test

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[12] Counsel of Record for Petitioners was counsel for the reporter in *In re Special Proceedings*, in which an order compelling disclosure was upheld. No writ of certiorari was sought in that case.

employed by the First Circuit: The "confidential sources" were undeniably relevant to claims against Petitioner Knox, the imposition of joint and several liability against all defendants, and to claims against the DFCI and Dr. Livingston. None of the referenced claims was frivolous and all were undertaken in good faith. In addition, the imposition of a default sanction is not in conflict: the First Circuit has affirmed a default sanction in a libel case for failure to produce discovery. *Sirelle* v. *Maloof*, 373 F.2d 520 (1st Cir. 1967).

Second Circuit. The Second Circuit also employs a balancing test, both for the disclosure of confidential and non-confidential sources. *Gonzales* v. *National Broad. Co.*, 194 F.3d 29, 36 (2d Cir. 1999) (civil suit) (in context of non-confidential sources "the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalists' privilege if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other sources"); *McGraw-Hill, Inc.* v. *Arizona*, 680 F.2d 5, 7 (2d Cir. 1982) (civil suit involving confidential sources applying fact-based balancing inquiry).

Third Circuit. The Third Circuit also employs a balancing test: "A determination of the specific circumstances in which the privilege will be required to yield to a paramount interest must be made on an *ad hoc* basis.... Therefore, we must balance on the one hand the policies which give rise to the privilege and their applicability to the facts at hand against the need for the evidence sought to be obtained in the case at hand." *Riley* v. *City of Chester*, 612 F.2d 708, 715-716 (3d Cir. 1979) (civil suit).

Fourth Circuit. Similarly, in *Larouche* v. *National Broadcasting Company, Inc.*, 780 F.2d 1134 (4th Cir.) (civil suit), *cert. denied*, 479 U.S. 818 (1986), the Fourth Circuit has held that "[i]n determining whether the journalist's privilege will protect the source in a given situation, it is necessary for the district court to balance the interests involved." *Id.* at 1139.

Sixth Circuit. The Sixth Circuit also employs a balancing test: "[C]ourts should ... follow the admonition of the majority in *Branzburg* to make certain that the proper balance is struck between freedom of the press and the obligation of all citizens to give relevant testimony ...." *In re Grand Jury Proceedings*, 810 F.2d 580, 586 (6th Cir. 1987).

Seventh Circuit. A fact-specific inquiry is also adopted in the Seventh Circuit: "It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas." *McKevitt* v. *Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (civil case involving non-confidential sources).

Eighth Circuit. The Eighth Circuit, too, has adopted a fact-intensive inquiry. *See Cervantes* v. *Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972) (discussing various different fact patterns under which decision as to whether to compel disclosure of confidential source information will differ), *cert. denied*, 409 U.S. 1125 (1973).

Ninth Circuit. The Ninth Circuit employs a balancing test. *Shoen* v. *Shoen*, 5 F.3d 1289, 1292-1293 (9th Cir. 1993) ("the process of deciding whether the privilege is overcome requires that 'the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts, and a balance struck to determine where lies the paramount interest'"); *Farr* v. *Pitchess*, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (same).

Tenth Circuit. The Tenth Circuit has stated that a balancing test must be employed. *Silkwood* v. *The Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977) (reversing because of "a failure to weigh the various factors" to be employed in balancing the competing interests).

D.C. Circuit. The D.C. Circuit has held that a balancing test should be used in civil cases where an assertion of the reporter's privilege is made: "to determine whether the privilege applies courts should look to the facts of each case,

weighing the public interest in protecting the reporter's sources against the private interest in compelling disclosure." *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981).

In light of the remarkable consistency among the circuits, and the fact that the decisions at issue in this case employed a similar balancing test, there is no conflict meriting review. To the extent that different courts of appeals have reached different outcomes using a balancing test, that, too, creates no reviewable conflict. The balancing test is necessarily fact-specific and the outcome in each case depends on circumstances particular to each case. Factual differences that lead to different outcomes in the decisions are no basis upon which to grant certiorari.

2. Discovery sanction of default

This case involves the issue of a default judgment entered in a libel case against a defendant for failure to provide discovery on purported First Amendment grounds. The Supreme Judicial Court's decision is entirely consistent with the only federal court of appeals decision Respondent has located that addresses the same issue. In *Adolph Coors Co. v. Movement Against Racism and The Klan*, 777 F.2d 1538 (11th Cir. 1985), the court upheld a default judgment against a libel defendant who had refused to produce court-ordered discovery on the grounds that the information was protected by the First Amendment. Faced, as here, with litigants who repeatedly refused to comply with discovery orders, the court articulated the important interplay between Rule 37 sanctions, the authority of the courts to enforce their orders, and the consequences of continuing to stand by mistaken assertions of privilege:

> Refusal to abide by the law is not cost-free. No litigant and no attorney, even if motivated by misguided perceptions of constitutional privilege, may be permitted to exhibit such contumacious conduct without risk of sanctions under Rule 37. It is manifestly the province and duty of the courts to say what the law is. When parties or lawyers substi-

> tute their own judgments for those of judges, we have not justice but chaos.

Id. at 1543 (citations omitted).

Moreover, the cases relied upon by Petitioners in support of their claim that the decisions of certain circuits regarding default judgments under Rule 37 are not, in fact, in conflict with the decision in this case. This is so because those cases are both legally consistent and factually distinct. *See General Ins. Co. of Am. v. Eastern Consol. Utils.*, 126 F.3d 215 (3d Cir. 1997) (unlike here, discovery was sought from a non-party and was not related to a claim asserted against it); *United States v. Kahalu Constr. Co.*, 857 F.2d 600 (9th Cir. 1988) (unlike here, the discovery sought did not relate to any claim against the party, the conduct was not willful, and lesser alternatives were available); *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334 (9th Cir. 1985) (unlike in this case, the discovery sought was not related to a claim against the party from which it was sought and the conduct was not willful).

C. The Supreme Judicial Court's Decision Does Not Conflict With The Decisions Of The Highest Court Of Another State

1. Assertion of reporter's privilege

The Supreme Judicial Court's decision is not in conflict with the state court decisions upon which Petitioners rely for three reasons. First, many of the cases to which Petitioners point turn on the existence and provisions of a state "shield" statute. Massachusetts has no shield statute and its legislature has expressly declined to adopt one. Second, no other state's highest court has held, after *Branzburg*, that an absolute privilege for reporters' sources arises from the First Amendment. Instead, the state courts have found either that there is no privilege or that there is a qualified privilege. Neither position presents a conflict with the Supreme Judicial Court's decision because, as stated above, the Massachusetts court applied the balancing test that a qualified privilege would entail should one, *arguendo*, exist.

The Massachusetts legislature has declined to enact a reporters' shield statute. *Petition*, 395 Mass. 164, 168-169 (1985) "It is evident that division exists within the Legislature over whether a reporter's privilege is warranted, and if so, what that privilege should include. Literally dozens of bills have been filed in recent years, with widely varying details. None has attracted the level of support necessary for passage." *Id.* As a result, the decisions of other states interpreting and applying their own state's shield statutes are both inapplicable to, and not in any conflict with, any issue presented here. The Massachusetts legislature having declined to enact a shield statute, the statutes of other states have no place in this case.

Thus, the following cases relied on by Petitioners cannot and do not present a question over which this Court should grant review: *Sands* v. *News Am. Publ'g Inc.*, 161 A.D.2d 30 (N.Y. App. Div. 1990) (decision dependent upon New York's shield statute);[11] *Sprague* v. *Walter*, 543 A.2d 1078 (Pa. 1988) (applying Pennsylvania's shield statute); *Oak Beach Inn Corp.* v. *Babylon Beacon, Inc.*, 464 N.E.2d 967 (N.Y. 1984) (reasoning dependent upon New York's shield statute); *Mitchell* v. *The Superior Court of Marin County*, 37 Cal. 3d 268 (1984) (reasoning based on California's shield statute); *Grand Forks Herald* v. *The District Court*, 322 N.W.2d 850 (N.D. 1982) (case governed by North Dakota's shield statute).

The remaining cases relied upon by Petitioners do not conflict with the decision of the Massachusetts Supreme Judicial Court because either they find that no First Amendment privilege exists (a question that is not raised by the Petition) or they find that a qualified privilege exists requiring application of a fact-specific balancing test.[11] *See Hope-*

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[11] *Sands* v. *News Am. Publ'g Inc.*, 161 A.D.2d 30 (N.Y. App. Div. 1990), also cannot form the basis for granting certiorari because it is not a decision out of the highest court of the state of New York.

[11] In addition, Petitioners rely on three decisions from the intermediate courts of California and Georgia. *Atlanta Journal-Constitution* v.

well v. *Midcontinent Broad. Corp.*, 538 N.W.2d 780 (S.D. 1995) (qualified privilege requiring application of a multi-factor fact-specific test), *cert. denied*, 519 U.S. 817 (1996); *State of West Virginia* v. *Henry*, 182 W. Va. 500 (1990) (balancing test under a theory of qualified privilege); *Downing* v. *Monitor Publ'g Co.*, 415 A.2d 683 (N.H. 1980) (no First Amendment privilege); *Winegard* v. *Oxberger*, 258 N.W.2d 847 (Iowa 1977) (qualified privilege requiring application of a fact-specific balancing test), *cert. denied*, 436 U.S. 905 (1978); *Gagnon* v. *The District Court*, 632 P.2d 567 (Colo. 1981) (no First Amendment privilege).

2. Discovery sanction of default

No conflict exists with respect to the decisions concerning default judgments of the Supreme Court of Washington and of the Supreme Court of Idaho upon which Petitioners rely. *Sierra Life Ins. Co.* v. *Magic Valley Newspapers, Inc.*, 101 Idaho 795 (1981); *Mitchell* v. *Watson*, 58 Wash. 2d 206 (1961). Both cases turned on a circumstance not present here: that the discovery sought was not related to a claim against the party refusing to produce it.[15] In stark contrast, the discovery sought in this case bore directly on claims against Petitioners and the evidence necessary to prove them. Specifically, as found repeatedly by the state and appellate courts, the discovery was necessary to Dr. Ayash's emotional distress claim against Petitioner Knox. It was particularly necessary because Knox argued that Dr. Ayash

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Jewell, 251 Ga. App. 808 (2001), *cert. denied*, 537 U.S. 814 (2002); *Dalitz* v. *Penthouse Int'l, Ltd.*, 168 Cal. App. 3d 468 (1985); *Caryl Richards, Inc.* v. *Superior Court*, 188 Cal. App. 2d 300 (1961). Even assuming a conflict between the decision in this case and those of the intermediate courts of others (which does not, in fact, exist), such a conflict is not a basis for granting certiorari under Supreme Court Rule 10. Moreover, *Caryl Richards*, 188 Cal. App. 2d 300, is a pre-*Branzburg* decision finding no reporter's privilege exists. It is irrelevant for that reason as well.

[15] *Mitchell* v. *Watson*, 58 Wash. 2d 206 (1961), is also incorrectly decided in that it misreads *Hovey* v. *Elliot*, 167 U.S. 409 (1897), in light of this Court's subsequent clarification of that opinion in *Societe Internationale*, 357 U.S. at 212.

was required, and would fail absent such evidence, to prove "extreme" and "outrageous" conduct sufficient to support the claim against him. In addition, without the evidence that the Petitioners withheld, Dr. Ayash was unable to prove her claim of joint and several liability among all defendants, including both of the Petitioners.

CONCLUSION

For the reasons set forth above, Dr. Ayash respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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